

7A4GZANC.txt

1

7A4GZANC
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----X
2

3 INDEPENDENT ASSET MANAGEMENT
3 and OLA HOLMSTROM

4 Plaintiffs,

5 v.

07 CV 6431 (JSR)

6 DANIEL ZANGER,

7 Defendant.
8
8 -----X

New York, N.Y.
October 4, 2007
4:00 p.m.

10 Before:

11 HON. JED S. RAKOFF,

District Judge

13 APPEARANCES

14 BALESTRIERE PLLC
15 Attorneys for Plaintiff
16 BY: CRAIG STUART LANZA

17 JONES DAY
17 Attorneys for Defendant
18 BY: MATTHEW E. SZWAJKOWSKI
18 THOMAS H. SEAR

19
19
20
20
21
22
23
24
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

2

7A4GZANC

1 (Case called)
2 (In open court)
3 THE DEPUTY CLERK: Will counsel please state their
4 appearances for the record.
5 MR. LANZA: Good afternoon, your Honor. Craig Lanza
6 on behalf of Independent Asset Management and Ola Holmstrom.
7 THE COURT: Good afternoon.
8 MR. LANZA: And, your Honor, I am here with an intern
9 from our office Matt Shu.
10 MR. SEAR: And Tom Sear for the defendant Daniel
11 Zanger.
12 MR. SZWAJKOWSKI: Matthew Szwajkowski for the

Page 1

7A4GZANC.txt

13 defendant Daniel Zanger.

14 THE COURT: Good afternoon. All right. We're here on
15 the motion to dismiss. Let me hear first from moving counsel.

16 MR. SEAR: Thank you, your Honor. Your Honor, I'll be
17 brief, because we certainly have I think made the points that
18 we wanted to make in our two briefs, and I know your Honor is
19 exceptionally diligent.

20 THE COURT: Assuming that I agree with you that
21 certain of the claims should be dismissed -- and I don't think
22 I agree that all of them should, but I think some perhaps
23 should -- why shouldn't it be without prejudice to your claim?

24 MR. SEAR: Your Honor, I think because a fair reading
25 of the complaint reflects that counsel was fulsome and

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

♀

3

7A4GZANC

1 expansive in alleging grievances which we don't think amount to
2 a legally sufficient claims but grievances. And secondly,
3 counsel expanded on them, in our view, in the opposition
4 papers, the point being that we think they have said everything
5 that they have to say and that there's no indication of
6 additional facts that could be pled that would --

7 THE COURT: Well, for example, if you say that they
8 have failed to indicate which provision or provisions of the
9 contract they believe have been breached, they in their
10 response indicate that they think they have, in essence,
11 alleged violations of paragraphs 1(e) and 13 of the contract
12 and perhaps 1(g) as well. So why shouldn't they be -- to the
13 extent that you have made an argument that the breach of
14 contract claim should be dismissed because of the failure to
15 allege the specific breaches in the specific paragraphs of the
16 breach, assuming, for the sake of argument, that I agree with
17 that, then you'll have to amend to add those three paragraphs
18 in.

19 MR. SEAR: Well, I think a fair reading -- I guess the
20 answer is I don't -- I haven't heard anything or read anything
21 from the plaintiffs that would indicate any facts that could be
22 added that would state a claim under those portions of the
23 contract. I mean, one of the points that we make, Judge, is
24 that the contract is pretty clear that they have a breach that
25 would entitle IAM to recover affirmatively. They have to state

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

♀

4

7A4GZANC

1 facts which would, if true, establish first negligence or
2 intentional malfeasance, theft or fraud, the point being that I
3 think at this point there has to be some indication of what
4 facts they would plead that would make alleged breaches of
5 those provisions of the contract constitute gross negligence or
6 intentional malfeasance. There's been no suggestion of any
7 such facts.

8 Indeed, the affirmative --

9 THE COURT: Well, the allegation is that Mr. Zanger,
10 quote, induced 125 margin calls and refused to cover a final
11 margin call, and they say those constitute various problems,
12 but including breaches of provisions in the contract. So if
13 you're saying you don't think on any possible view those could
14 constitute breaches of contract, I understand that argument.

15 MR. SEAR: That's the argument. I mean, the
16 contract -- let me give you a chance, Judge --

17 THE COURT: So paragraph 1(e), for example, says that
Page 2

7A4GZANC.txt

18 your client, quote, shall remain in full compliance at all
19 times with prime broker limits, rules or guidelines, and they
20 say those margin calls constitute a violation of various rules
21 and guidelines.

22 MR. SEAR: I don't think they do, Judge. I think they
23 say that the 125 -- I don't see any allegation in the complaint
24 that says the 125 margin calls violated any guidelines, rules
25 or limits.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

5

7A4GZANC

1 THE COURT: So supposing that is their position that
2 it did, you would agree then they should be given leave to
3 replead. Yes?

4 MR. SEAR: I still think they should have come forward
5 already and given you an indication that that's what they were
6 saying. I don't understand them to say that the existence of
7 125 margin calls that were covered that they say were induced
8 by Mr. Zanger constitute a breach of the contract when the
9 contract itself explicitly provides in 1(a) for 4-to-1
10 leverage, which is inconsistent with the inducing of those
11 margin calls being a breach of the agreement.

12 Let me go on to say they do say that the circumstances
13 surrounding the final margin call --

14 THE COURT: well, paragraph 23 of their complaint they
15 say, quote, defendant constantly ran afoul of the requirements
16 of the agreement and the exchange he was trading. Now, I don't
17 know what they have specifically in mind, but if it violated
18 the exchange rules and that's what they have in mind and they
19 have some specific rules in mind and they think that,
20 therefore, by violating those rules, he violated both 1(e) and
21 13, why shouldn't they be given leave to replead?

22 MR. SEAR: Judge, I understand that leave to replead
23 is literally given. I have the sincere belief that able
24 counsel for the plaintiffs, if they had specific rules of the
25 exchanges or prime brokers that they say were breached by the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

6

7A4GZANC

1 125 margin calls, we would have heard of it.

2 THE COURT: All right. well, let's find out. Let me
3 interrupt you. Are there specific rules?

4 MR. LANZA: Yes, your Honor, there are.

5 THE COURT: what?

6 MR. LANZA: There were rules from the prime broker.
7 There's a whole host of exchanges from the prime broker --

8 THE COURT: Give me a rule that you say they broke.

9 MR. LANZA: well, the margin calls themselves were
10 considered violations by the prime broker. In effect, what
11 happened here --

12 THE COURT: wait a minute. well, you say that the
13 defendant constantly ran afoul of the requirements for the
14 agreement and the exchange he was trading on. what is the
15 requirements of the exchange that you are referring to?

16 MR. LANZA: Judge, what we meant by that was the prime
17 broker as well as the administrator. This was what was
18 contemplated by the exchange. This is the vehicle for which
19 IFL was able to make those trades. Because of the --

20 THE COURT: Excuse me. So are you saying that there's
21 no express rule of any exchange that they violated directly?

22 MR. LANZA: No, your Honor. I'm saying I can't at

7A4GZANC.txt

23 this time cite chapter and verse as to what that rule is, but I
24 can say --

25 THE COURT: Well, that's the gauntlet that your
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

7A4GZANC

7

1 adversary has laid down in his papers. If you are not ready to
2 tell me today in court in oral argument after requesting leave
3 to replead, when will you be ready? I mean, this is your
4 opportunity.

5 MR. LANZA: Well, your Honor, it really would just
6 require taking a look at the e-mail exchanges from the prime
7 broker to IFL specifically to Independent Asset Management
8 saying you are in violation of our rules. You've done this 125
9 times, or saying --

10 THE COURT: Do they say that?

11 MR. LANZA: They do say that. There are exchanges
12 from a woman named Giovana Artura who works for Goldman, Sachs
13 who was consistently irate over these margin calls, and they
14 were --

15 THE COURT: Well, being consistently irate doesn't
16 state a breach of contract. It may, you know, give her lots of
17 stress, but I understand that's part of being an employee of
18 Goldman, Sachs anyway. But does she say you violated the
19 rules?

20 MR. LANZA: Yes, your Honor. It's our understanding
21 that she does, and she actually indicates which rules were
22 violated by these margin calls.

23 THE COURT: All right.

24 MR. LANZA: In addition, Judge, if I may, if we were
25 allowed to replead, one other fact which we saw as something
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

♀

7A4GZANC

8

1 that buttressed our argument and didn't necessarily need to
2 come in because of the sort of plain-statement rules that are
3 here, but a very significant fact is the fact that Dan Zanger
4 wasn't compliant with IAM. There were a number of exchanges,
5 for example, where these margin calls were never recorded.
6 They only found out --

7 THE COURT: Let me go back to Mr. Sear. Mr. Sear,
8 your adversary, though arguably less prepared than he ideally
9 might have been, says that there are specific e-mails that
10 identify specific rules that allegedly were violated. Why
11 shouldn't he be given the opportunity to put that into his
12 complaint?

13 MR. SEAR: Because the standard for the alleged breach
14 of contract here is one where they have to plead facts which,
15 if true, would establish intentional malfeasance or gross
16 negligence.

17 THE COURT: No. No. We're talking about the breach
18 of contract.

19 MR. SEAR: Yes. That's the standard under the
20 contract, Judge.

21 THE COURT: The --

22 MR. SEAR: That's the only way -- it's very important,
23 Judge.

24 THE COURT: No. I understand what you're saying, but
25 I don't understand how that can be a basis for a dismissal. In

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

Page 4

7A4GZANC.txt

9

7A4GZANC

1 other words, he says there are a bunch of e-mails saying that
 2 your client repeatedly violated the rules. So why doesn't that
 3 motion to dismiss constitute a sufficient basis to constitute
 4 gross negligence?

5 MR. SEAR: Because by itself, that factual allegation,
 6 as general as it is, if true, does not rise to the level of
 7 establishing, if true, gross negligence, which under New York
 8 law applicable here -- I think we both agree on that -- is
 9 conduct that smacks of intentional wrongdoing or intentional
 10 malfeasance, which is intentional wrongdoing.

11 Keep in mind, your Honor, this is a situation in
 12 which --

13 THE COURT: No. Let's be clear. Gross negligence,
 14 not only under the law of New York but everywhere, does not
 15 require as much intentionality as a nonnegligent intent.

16 MR. SEAR: Right. The phrase that is used in the case
 17 that I think both sides cite is it smacks of intentional
 18 wrongdoing.

19 THE COURT: There's nothing like a good smacking, but
 20 it's hard to know what that means in the context of a
 21 complaint.

22 MR. SEAR: Well, we have cited in our brief, your
 23 Honor, the cases which say you've got to plead gross negligence
 24 or intentional malfeasance, sticking with gross --

25 THE COURT: Well, I'm not arguing with you at the
 SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

10

7A4GZANC

1 moment that they have necessarily pled -- it seems to me
 2 crystal clear at least some of their claims are not adequately
 3 pled. Without going through each and every claim for the
 4 moment, the question I'm posing is why shouldn't they be given
 5 another bite at the apple?

6 MR. SEAR: I have to say I'm surprised to hear counsel
 7 say what he just said, because I would have expected it. If
 8 they had that, we would have heard that before. This is news
 9 to me in terms of the alleged violations I guess of -- I think
 10 he is saying of the exchange based upon the 125 margin calls.
 11 My understanding is there's nothing wrong with margin calls.
 12 You have to cover a margin call. Margin calls were covered
 13 here. Whenever you trade on leverage, which is explicitly
 14 contemplated under this, you're invariably going to end up with
 15 margin calls.

16 THE COURT: Well, I'm going to interrupt you, because
 17 I think it is unlikely that they will be able to replead at
 18 least some of their claims, but I really think I would be
 19 inclined to face a well-accepted Second Circuit precedent if I
 20 didn't give them one more shot.

21 Now, there are some claims -- and let's turn to
 22 them -- where it's not a question of adding more pleadings.
 23 And I'm referring to the ones that are inconsistent with an
 24 express contract claim like a breach of fiduciary duty and
 25 unjust enrichment and a promissory estoppel claim.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

11

7A4GZANC

1 But my question for you, Mr. Sear, is you have
 2 asserted or do you intend or at least want to keep open the
 3 option of asserting that the contract itself is invalid? If

7A4GZANC.txt

4 you do, then they'd complete that in the alternative agreement.
5 MR. SEAR: We do not. We rest on the contract. We
6 defended on the contract. We think the contract provisions
7 provide a defense to all of these claims. And so I appreciate
8 what you are saying, your Honor.
9 THE COURT: All right. So let me turn, if I may --
10 and I will come right back to you in a minute -- to your
11 adversary. And given that assertion, isn't it crystal clear
12 that the fiduciary duty of unjust enrichment and promissory
13 estoppel claims have to go?
14 MR. LANZA: Given that assertion and in the case with
15 the unjust enrichment and promissory estoppel claims, provided
16 the other side is willing to stipulate that the contract is a
17 valid --
18 THE COURT: Yeah. What they are stipulating is they
19 will not assert the invalidity of the contract. Correct?
20 MR. SEAR: Correct.
21 MR. LANZA: However, Judge, I believe the fiduciary
22 duty arises from a totally different standard. This is a joint
23 venture. There are cases out there -- for example, the other
24 side relies on a case called Cadbury.
25 THE COURT: Okay. I agree with you that the fiduciary
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

12

7A4GZANC

1 duty is a different -- not necessarily the same analysis. I
2 know there are many, many arguments that both sides make here,
3 and I don't mean to cut you short, but you did give me very
4 full papers on both sides. What I think I should do is issue
5 no later than Tuesday of next week a bottom-line order with an
6 opinion to follow saying which claims are gone, period, which
7 claims are not gone, period, and which claims are gone without
8 prejudice to replead it.
9 why don't we talk now on that third category of -- a
10 contract claim would be a good example -- how long you want to
11 replead the ones that I'm going to dismiss without prejudice.
12 MR. LANZA: Well, your Honor, we wouldn't need much
13 time. I mean, it's a question of me going back to my client,
14 going through what's there. He has already sent me things that
15 involve exchanges between him and Goldman, Sachs.
16 THE COURT: So two weeks?
17 MR. LANZA: That seems reasonable, Judge.
18 THE COURT: So two weeks from Tuesday would be October
19 23rd. Then the movant against some of the repleaded claims,
20 maybe adopting large parts of your existing --
21 MR. SEAR: We very well may. I'm --
22 THE COURT: Well, I'll give you that opportunity. So
23 assuming you wanted to, could you do that within two weeks
24 after?
25 MR. SEAR: Yes.
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

13

7A4GZANC

1 THE COURT: So that would be November 6th, answering
2 papers November 20th, reply papers November 27th. I don't
3 think I need oral argument at that point. And I would get you
4 a bottom-line ruling on that by December 7th in honor of Pearl
5 Harbor day.
6 So what I think you ought to do -- and you don't have
7 to submit it to me today. Wait till you get my bottom-line
8 ruling. But prepare a new case management plan -- because I
Page 6

7A4GZANC.txt

9 know you are going to bring one -- premised on all discovery
10 kicking in after December 7th, after which you'll know where it
11 stands, and with all discovery to be completed within five
12 months thereafter. Okay?

13 MR. SEAR: Thanks very much.

14 MR. LANZA: Thanks, your Honor.

15 o0o
16
17
18
19
20
21
22
23
24
25

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀